fore be taken to have the normal meaning assigned to it in English Common Law by virtue of section 3 of the Civil Law Ordinance, 1956. According to Halsbury, 3rd edition, Volume 17, page 299, paragraph 511 note (f) "Great Britain, like most nations, claims an extent of one marine league (3 miles) measured from low water mark as being the limits of territorial waters." It was conceded by the Public Prosecutor that since the Federation has not yet acceded to the new international convention on jurisdiction over the territorial sea, the contiguous zone and the continental shelf, this particular fishing stake was situate without territorial waters.

In section 14(ii)(f) of the Enactment we find four areas of waters contrasted — (a) without (i.e. outside) territorial waters (b) within territorial waters (c) within tidal waters (d) within inland waters. Territorial waters appear to extend from low water mark to three miles out from the shore. Inland waters, by definition, are all rivers etc. for that portion of their water-course which is beyond the influence of tides. The logical inference is that tidal waters relates to that part of the sea from low water mark to high water mark and inland as far as the tide flows and re-flows. There is nothing in the definition of "tidal waters" in section 2 to suggest that "sea" as used in it means the oceans of the world. If that were intended there would be no need to provide for areas of sea "without territorial waters".

If I am right, therefore, in my deductions, a person who maintains a fishing stake outside territorial waters (as was the respondent in this case) is not maintaining a fishing stake in tidal waters for the purposes of this Enactment.

The rule relates to tidal and inland waters only and not to areas within or without territorial waters. The charge was incorrectly framed in alleging an offence in tidal waters and the respondent was correctly discharged. It is not necessary for me to consider whether or not section 14(ii)(f) is intra vires the legislature's powers where it purports to control activities "without territorial waters".

The appeal is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. RAMIAH & ORS.

[A. Cr. J. (Thomson C.J.) May 15, 1959]

[K. L. — Criminal Appeal No. 6 of 1959]

Penal Code s.454 — "Theft" and "larceny" — Difference between local law and English law.

This was an appeal against the acquittal of the first respondent who, with two others, was prosecuted for housebreaking in order to the committing of an offence of theft contrary to section 454 of the Penal Code. The facts were not in dispute and were as follows: on the morning of November 25, 1958 the three accused broke into the living room of the complainant and removed a trunk containing a large quantity of property. Some days later the trunk with its contents intact was found in the possession of one of them. The defence of the first respondent which was accepted by the President and was supported to some extent by the evidence of the complainant himself, was that the complainant owed him money and that he removed the property because he thought that if he kept it for a few days the complainant would pay the debt. He had no intention to steal. The defence of the other accused was that they thought the property was that of the first respondent and that they assisted him to remove it.

Held: on the facts the first respondent should have been found guilty of the offence charged against him.

Observations on the difference between local law of "theft" and English law of "larceny".

Case referred to:—

(1) *Queen-Empress* v. *Sri Churn Chungo* I.L.R. 22 Cal. 1017, 1021.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamed Salleh bin Abas (Federal Counsel) for the appellant.

S. Sothi for the first respondent.

Appeal allowed.

Thomson C.J.: This appeal raises a short point concerning an important difference between our local law and the law of England.

The three accused in this case were prosecuted in the Sessions Court at Kuala Lumpur for house-breaking in order to the committing of the offence of theft in contravention of section 454 of the Penal Code. All three of them were found not guilty and discharged.

The facts are simple and have never been seriously in dispute.

On the morning of 25th November, 1958, the three accused broke into the living room of the complainant and removed a trunk containing a large quantity of property. Some days later the trunk with its contents intact was found in the possession of one of them. The defence of the first accused which was accepted by the learned President and was supported to some extent by the evidence of the complainant himself, was that the complainant owed him money and that he removed the property because he thought if he kept it for a few days the complainant would pay the debt. He had no intention to steal. The defence of the other two accused was that they thought the property was that of the first accused and that they had assisted him to remove it.

No complaint has been made regarding the acquittal of the second and third accused. The prosecution, however, have appealed against the acquittal of the first accused.

Larceny in English law is not the same as theft under the Penal Code. In particular it is an essential ingredient of larceny that there should be at the time of the taking an intention permanently to deprive the owner of the thing taken (see Larceny Act, 1916, section 1). On the view of the facts taken by the learned President there could thus be no question of what the first accused did amounting to larceny.

"Theft" on the other hand is defined by the Penal Code (section 378) as follows:—

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

"Dishonestly" is defined by section 24 as follows:—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'".

In the Indian case of *Queen-Empress* v. *Sri Churn Chungo*[1] the facts were similar to those of the present case. Petheram, C.J., referred to the sections of the Indian Penal Code corresponding to the sections of our Code which have been quoted and went on to observe:—

"It is evident that it was the intention of the Legislature that it should be theft under the Code to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code."

On this view of the law which I have no hesitation in following the first accused should clearly have been found guilty of the offence charged against him. The appeal is accordingly allowed, the order of acquittal and discharge is set aside and a conviction is substituted for it.

Appeal allowed.

YAP TENG CHAI v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) June 1, 1959]

[Muar — Criminal Appeal No. 5 of 1959]

Penal Code s.224 — Attempting to escape from lawful custody — Adequacy of sentence.

Criminal Law and Procedure — Sentence — Alteration of sentence of lower Court — Observations on sentence.

In this case the appellant had been convicted of the offence of attempting to escape from the lawful custody under section 224 of the Penal Code and sentenced to one month's imprisonment and a fine of $300 in default three months' imprisonment. The facts showed that the offence in respect of which he was accused was trivial, no violence to person or property was used in the attempt, which appeared to have been made on the sudden impulse and the appellant was a first offender.

Held: the sentence was manifestly wrong in the sense that it was unsuitable to the proved facts and circumstances. Appeal against conviction dismissed, sentence varied.

Observations on sentence.

Cases referred to:—

(1) *Abu Bakar bin Alif* v. *R.* [1953] M.L.J. 19.

(2) *Public Prosecutor* v. *Fam Kim Hock* [1957] M.L.J. 20.

(3) *Lee* v. *R.* [1948-49] M.L.J. Supp. 87.

(4) *Kang Yeow Hooi* v. *Public Prosecutor* [1954] M.L.J. 233.

(5) *Abdul Karim* v. *R.* [1954] M.L.J. 86.

(6) *Yap Tan Lim* v. *R.* (1930), 2 M.C. 119; [1947] M.L.J. xvii.

(7) *Chua Ah Gan* v. *Public Prosecutor* [1958] M.L.J. liv.

MAGISTRATE'S CRIMINAL APPEAL.

C. P. S. Wong for the appellant.

Pawan Ahmad (Federal Counsel) for the respondent.

Hepworth J.: In this case the accused had been convicted of the offence of attempting to escape from lawful custody under section 224 of the Penal Code and sentenced to one month's imprisonment and a fine of $300 in default three months' imprisonment. He appealed against both conviction and sentence. I dismissed the appeal against conviction but allowed the appeal against sentence varying the sentence to one of a fine of $300 in default three months' imprisonment. I considered that the sentence was manifestly wrong in the sense that it was unsuitable to the proved facts and circumstances because the offence in respect of which he was in custody was trivial, no violence to person or property was used in the attempt, the attempt appeared to have been made on a sudden impulse and the accused was a first offender.

Now an Appellate Court should not alter a sentence merely because the members of the Court might have passed a different sentence. *(Abu Bakar bin Alif* v. *Rex*[1]*)*. The sentence of the Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. *(Public Prosecutor* v. *Fam Kim Hock*[2]*)*. When the sentence of a Court of first instance is varied by an Appellate Court it is in the majority of cases, as in the present case, because the sentence is unsuitable to the proved facts and circumstances. I think therefore it may prove of value if I recapitulate views, with which I respectfully agree, which in the past have been expressed on the subject from time to time by other Judges, in addition to expressing my own opinion.

In fixing sentence, the nature of the offence, the circumstances and the degree of deliberation must be taken into account. *(Lee* v. *Rex*[3]*)*.

Consideration should always be given to the imposition of a substantial fine with a view to avoiding the necessity of sending persons to prison who have committed offences which are not *mala per se*. *(Kang Yeow Hooi* v. *Public Prosecutor*[4]*)*.

In general I take the view that a sentence should be either a sentence of imprisonment or a sentence of fine and not both. Again speaking generally cases in which a sentence of imprisonment and fine might, in my opinion, fairly be imposed are cases of serious revenue offences and in the case of offences which are not *mala per se* but where it has become apparent that sentences of fine only on other persons in the area in respect